KARTA v. HALIMAH

[A. C. J. (Ambrose J.) July 2, 1960]

[Singapore — District Court Appeal No. 6 of 1960]

Muslim Law — Maintenance of children — Wife voluntarily agreeing to maintain the children of the marriage at time of divorce — Whether this precludes her from claiming maintenance for them — "Talak" divorce and "Khula" divorce.

This was an appeal against a maintenance order for payment by the appellant of a monthly allowance of $15 in respect of each of his three children by the respondent. The appellant divorced the respondent in 1955 at her request; he alleged that when she asked him to divorce her, she said, in the presence of the Kathi and two witnesses, that she was prepared to maintain the children: this she denied. It was found as a fact that the respondent had omitted to claim maintenance for the children for a period of four years.

Held: as the appellant had divorced the respondent by pronouncing one *talak* at her request, his position should not be worse than it would have been, if the divorce had been a *khula* divorce. In the circumstances, the respondent had precluded herself from claiming maintenance for her children.

[Editorial Note: See Editorial comment: "Right to Maintenance under Muslim Law" at p. xlii, *supra*].

DISTRICT COURT APPEAL.

A. Muthuswamy for the appellant.

Edward Loke (Asst. Director of Legal Aid) for the respondent.

Ambrose J.: This was a civil appeal against a maintenance order made by a Magistrate for payment by the appellant of a monthly allowance of $15 in respect of each of his three children by the respondent.

The parties were married according to Muslim rites at Pontian, Johore, in 1945. The appellant divorced the respondent at the Kathi's office at Pontian on the 14th August, 1955.

The question of fact which the Magistrate had to decide was this: did the respondent voluntarily agree to maintain the children herself at the time of the divorce? He held that she did not. The first point raised by the appeal was whether his decision was wrong.

The appellant deposed that the respondent asked him to divorce her: this was admitted by the respondent. The appellant added that, when she asked him to divorce her, she said that she was prepared to maintain the children in the presence of the Kathi and two witnesses: this she denied.

The judgment of the Magistrate was in no way based upon his opinion of the demeanour of witnesses. I was, therefore, in as good a position as the Magistrate to weigh the evidence.

Evidence corroborating the appellant's testimony was given by the Kathi concerned and the appellant's brother-in-law, who was one of the two witnesses. The evidence of the latter was rejected by the Magistrate on the ground that he was closely related to the appellant and, therefore, neither independent nor disinterested.

The Magistrate also rejected the evidence of the Kathi, taking the view that the Kathi was neither independent or disinterested, because he was the person who granted the divorce to the appellant on his application. The Magistrate clearly misdirected himself as to the true function of the Kathi. Under the Muhammadan Marriage and Divorce Registration Enactment in force in Johore, the Kathi does not grant a divorce but merely registers it. The divorce in this case was effected by the appellant pronouncing one *talak*. The reason given by the Magistrate for rejecting the evidence of the Kathi was, therefore, devoid of substance.

Another reason given by the Magistrate for rejecting the evidence of the Kathi was that he did not believe the Kathi, when he said that it was unnecessary to incorporate in the divorce certificate the important condition agreed to by the respondent that she would maintain the children. Here attention must be drawn to section 17 of the Johore Enactment which has been referred to above and which provides as follows:

> "Nothing in this Enactment shall be construed to render valid or invalid, merely by reason of its having been or not having been registered, any Muhammadan marriage, divorce or revocation of divorce which would otherwise be invalid or valid."

It follows from this section that, if a Muslim divorce is otherwise valid in Johore, failure to register it does not invalidate it. It was not disputed that the divorce effected by the husband pronouncing one *talak* was valid. According to the Law of Islam, any Muslim of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause. A divorce by the husband at his will, without the intervention of a Court, is called *talak*: see *Mulla's* Mahomedan Law, 14th edition, page 264. In my opinion, the Johore Enactment does not require the Kathi, when he registers a divorce effected at the will of the husband by the pronouncement of one *talak*, to register any agreement between the husband and wife as to future maintenance of their children. That being so, the second reason given by the Magistrate for rejecting the evidence of the Kathi was unsatisfactory. In the circumstances, there was no reason why the Kathi's evidence should not have been accepted by the Magistrate.

The evidence of the appellant was not accepted by the Magistrate as there was no written proof of the alleged agreement. In my opinion, oral evidence of the agreement was admissible, there being no statutory requirement that it should be reduced to writing.

The Magistrate said that he did not believe that the respondent agreed to forgo maintenance at the time of the divorce, as she was then in the fifth month of her pregnancy. Here it must be said that he failed to consider that the respondent's omission to claim maintenance for the children for a period of four years was more consistent with the appellant's story than her own.

I was satisfied that there was sufficient justification for reversing the Magistrate's conclusion.

I, therefore, set aside his finding of fact and held that the respondent agreed, at the time of the divorce, to maintain her children.

The second point I had to consider was whether the Magistrate erred in law in holding that, even if the respondent had agreed, at the time of the divorce, to maintain the children, the Court was not thereby precluded from making a maintenance order against the appellant. In the case of a *khula* divorce, the contract may provide for the release of the husband from his obligation to maintain his children by his wife. A *khula* divorce is a dissolution of marriage by agreement, when the aversion is on the side of the wife and she desires a separation. It is effected by an offer from the wife to compensate the husband, if he releases her from his marital rights, and acceptance by the husband of the offer: see *Mulla's* Mahomedan Law, 14th edition, page 272. If the divorce in the present case had been a *khula* divorce, the respondent would not have been in a position to claim maintenance for her children as she had agreed not to claim it at the time of the divorce. I was unable to see why the position of the appellant, who had divorced his wife by pronouncing one *talak* at her request, should be worse than it would have been, if the divorce had been a *khula* divorce. In the circumstances, I decided that the respondent had precluded herself from claiming maintenance for her children, and that the Magistrate had erred in holding that the Court was not precluded from making a maintenance order against the appellant.

For the above reasons I allowed the appeal and set aside the maintenance order.

Appeal allowed.

Solicitors: *Muthu & Co.; Director of Legal Aid.*

Re LEE PHEE SOO, DECD.

[C. A. (Rose C.J., Tan Ah Tah & Chua JJ.) July 21, 1960]

[Singapore — Civil Appeal No. 2 of 1960]

Gifts — Transfer of Shares — Transferor resident outside sterling area — Death of transferor before permission was granted under Finance Regulations, 1946, by Controller of Finance or his deputy — Whether gifts complete — Finance Regulations, 1946, regs. 4(2) and 10(1).

This is an appeal from the decision of Ambrose J. who held that transfers of shares by way of gifts made by the deceased transferor to his sons outside the sterling area, without the permission of the Controller of Finance prior to the deceased's death, were complete as the subsequent approval given by the Controller to the transfers operated retrospectively by virtue of reg. 4(2) of the Finance Regulations, 1946. The facts of the case are set out in the Judgment of Ambrose J. in [1960] M.L.J. 75.

Held: (1) the Controller's approvals related to the transfers which were the subject matter of the suit and purported to be a permission, authorisation or consent under reg. 4(2);

(2) the deceased had failed to obtain, or even ask for, the necessary permission of the Controller and he could not therefore be said to have done all that was in his power to perfect the gift;

(3) reg. 4(2) could not be invoked to validate an imperfect gift at the date of the transferor's death. Accordingly the gifts of shares formed part of the residuary estate of the transferor at the time of his death.

Decision of Ambrose J. (reported in [1960] M.L.J. 75) reversed.

Cases referred to:—

(1) *Re Rose*, [1949] Ch. 78; [1948] 2 All E.R. 971.

(2) *Re Rose*, [1952] Ch. 499; [1952] 1 All E.R. 1217.

(3) *Re Fry*, [1946] Ch. 312; [1946] 2 All E.R. 106.

CIVIL APPEAL.

T. W. Ong for plaintiffs/appellants.

R. L. Eber for defendant/respondent.

Cur. Adv. Vult.

Rose C.J.: This matter turns on the effect to be given to a posthumous application for and grant of permission under regulation 4(2) of the Finance Regulations, 1946, which reads as follows:—

"Any exemption, permission, authorisation or consent, made or granted under these Regulations may be declared to be retrospective to such date as may be specified and thereupon the like consequence shall ensue as if the exemption, permission, authorisation or consent had been made or granted on the day to which it is so declared to be retrospective."

The first of the three questions set out in the special case was:

"Were the gifts of the shares by the intestate to Lee Seng Kee and Lee Seng Chin under and by virtue of the transfers executed by the intestate on the 28th June, 1946, incomplete at the date of death in so far as no approval for the transfers was obtained from the Controller of Finance under the Finance Regulations, 1946, before the date of death of the intestate or before the date of execution of the transfers?"

Regulation 10(1) of the Finance Regulations, 1946, provides as follows:—

"Subject to any exemption which may be granted by order of the Controller or his deputy, no person shall, except with permission granted by the Controller or his deputy, transfer any security, either on his own behalf or on behalf of any other person, unless —

(a) the holder of the security and, if the holder is a nominee, the person for whom he is acting as nominee are resident in the sterling area; and

(b) the transferor has produced to the person to whom the security is to be transferred or to his agent such evidence of the facts aforesaid as may be prescribed by instructions issued by the Controller or his deputy;

and no person shall, except with such permission as aforesaid, acquire any security, either on his own behalf, or on behalf of any other person, unless such evidence as aforesaid has been produced to him or to his agent."

The contention of the appellant is that the intended gifts were incomplete as no permission under the Finance Regulations by the Controller of Finance or his deputy for the transfer of the shares prior to the execution of the transfers by the intestate had been granted, or even applied for by the intestate. And the appellant relies upon the case of *In re Fry.* [3] in which it was held that the intended gift was incomplete and therefore inoperative in that the donor had not done everything required of him